

FEDERAL COURT OF AUSTRALIA

Singh v Minister for Immigration and Border Protection [2014] FCA 850

Citation:	Singh v Minister for Immigration and Border Protection [2014] FCA 850
Appeal from:	Application for leave to appeal: Singh v Minister for Immigration [2014] FCCA 845
Parties:	VARINDER SINGH v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and MIGRATION REVIEW TRIBUNAL
File number:	SAD 81 of 2014
Judge:	WHITE J
Date of judgment:	19 August 2014
Catchwords:	MIGRATION – application for leave to appeal – seeking to appeal dismissal of judicial review application from MRT decision – MRT having refused application for Skilled (Provisional) (Class VC) visa – MRT having complied with procedural requirements – failure to establish denial of procedural fairness – grounds for grant of leave to appeal not established
Legislation:	<i>Federal Circuit Court Rules 2001</i> (Cth) r 44.12 <i>Federal Court of Australia Act 1976</i> (Cth) s 24(1A) <i>Migration Act 1958</i> (Cth) ss 97, 359A, 360, 368, 476 <i>Migration Regulations 1994</i> (Cth) reg 1.15C, Sch 2 cl 485.224, Sch 4 pt 1 item 4020
Cases cited:	<i>Alcock v Commonwealth of Australia</i> [2012] FCA 870 <i>Decor Corporations Pty Ltd v Dart Industries Inc</i> [1991] FCA 655; (1991) 33 FCR 397 <i>MZZBU v Minister for Immigration, Multicultural Affairs and Citizenship</i> [2013] FCA 840 <i>MZZPL v Minister for Immigration and Border Protection</i> [2014] FCA 110 <i>Plaintiff M61/2010 v The Commonwealth</i> [2010] HCA 41; (2010) 243 CLR 319 <i>Samsung Electronics Co Ltd v Apple Inc</i> [2013] FCAFC 138 <i>SZAJB v Minister for Immigration and Citizenship</i> [2008] FCAFC 75; (2008) 168 FCD 410 <i>SZLQZ v Minister for Immigration and Citizenship</i> [2008] FCA 717 <i>SZTBO v Minister for Immigration and Border Protection</i>

[2014] FCA 269
Trivedi v Minister for Immigration and Border Protection
[2014] FCAFC 42

Date of hearing:	4 August 2014
Place:	Adelaide
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	28
Counsel for the Applicant:	The Applicant appeared in person
Counsel for the First Respondent:	Mr K Tredrea
Solicitor for the First Respondent:	Australian Government Solicitor
Counsel for the Second Respondent:	The Second Respondent did not appear

**IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION**

SAD 81 of 2014

BETWEEN: VARINDER SINGH
Applicant

AND: MINISTER FOR IMMIGRATION AND BORDER
PROTECTION
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

JUDGE: WHITE J

DATE OF ORDER: 19 AUGUST 2014

WHERE MADE: ADELAIDE

THE COURT ORDERS THAT:

1. The application for leave to appeal be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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SAD 81 of 2014

BETWEEN: VARINDER SINGH
Applicant

AND: MINISTER FOR IMMIGRATION AND BORDER
PROTECTION
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

JUDGE: WHITE J

DATE: 19 AUGUST 2014

PLACE: ADELAIDE

REASONS FOR JUDGMENT

1 1 This is an application for leave to appeal against a judgment of the Federal Circuit Court of Australia (the FCC) dismissing an application under s 476 of the *Migration Act 1958* (Cth) for review of a decision of the Migration Review Tribunal (the MRT). The FCC Judge dismissed the application pursuant to r 44.12 of the *FCC Rules 2001* (Cth): *Singh v Minister for Immigration* [2014] FCCA 845 at [15].

2 2 The applicant, who is an Indian national, applied on 24 June 2011 for a Skilled (Provisional) (Class VC) Subclass (Skilled Graduate) 485 visa. A delegate of the Minister refused that application and that refusal was affirmed by the MRT on 18 July 2013. It considered that the International English Language Testing System (IELTS) report submitted by the applicant in support of his visa application was a “bogus document” as defined in subpar (a) of the definition in s 97 of the Migration Act and, accordingly, it was not satisfied that there was no evidence before it that the applicant had given or caused to be given to the Minister a bogus document in relation to the application for the visa. The MRT was there referring to the requirements of cl 485.224 in Sch 2 to the *Migration Regulations 1994* (Cth) and to Public Interest Criterion 4020 (PIC 4020).

3 Clause 485.224, as in force at relevant times, required, amongst other things,
that an applicant for a Skilled Graduate visa satisfy PIC 4020. Schedule 4 to the Migration
Regulations contains the PIC. PIC 4020(1) provides as follows:

- (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
 - (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.

The expression “bogus document” is defined in s 97 of the Migration Act as follows:

bogus document, in relation to a person, means the document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

As noted, it is subpar (a) of this definition which is pertinent presently.

4 The IELTS report provided by the applicant in support of his visa application contained his personal details, including his date of birth, and his photograph. It indicated that the applicant had undertaken the IELTS test on 15 January 2011 in India and that he had obtained an overall band score of 7.0, sufficient to satisfy the requirements of reg 1.15C of the Migration Regulations as to English competence.

5 The Minister’s delegate, when considering the application for the visa, had obtained a verification of the IELTS report submitted by the applicant. The photograph on the IELTS verification document of the person who had undertaken the test on 15 January 2011 did not match that of the applicant. The Minister’s delegate had concluded that the IELTS certificate was a bogus document because another person had sat the test on which the applicant relied.

6 At the initial hearing before the MRT on 3 April 2013, the applicant, who was then represented, maintained that he was the person who had undertaken the test and that he did not know the person in the photograph from the IELTS verification website for his certificate. He accepted that he was not the person in the photograph on the IELTS

Ms Wagner went on to conclude that the “print security” in the region of the candidate’s image on the IELTS certificate has been compromised and expressed her opinion that the document had been fraudulently altered.

- 7 On the basis of this evidence, the MRT concluded as follows:

[17] The Tribunal has taken into consideration the applicant's evidence that he personally sat the relevant IELTS test and that his test result submitted to the Department is genuine. However, for the reasons set out in its s.359A letter, on the basis of the findings of the document examiner the Tribunal reasonably suspects that the applicant's relevant IELTS test report purports to have been, but was not, issued in respect of the applicant. It follows that the Tribunal finds that this IELTS test report is a "bogus document" within the meaning of s.97(a). The Tribunal is therefore not satisfied that there is no evidence before it that the applicant has given or caused to be given to the Minister or an officer a bogus document in relation to the application for the visa. It follows that the applicant does not meet the requirements of PIC 4020(1).

[18] Further or alternatively, as flagged with the applicant at the hearing under s.359AA of the Act, the Tribunal finds that the photograph recorded with the IELTS verification website as the person who sat the relevant IELTS test does not match the photograph appearing on the test report which the applicant submitted to the Department. On the basis of this information, the Tribunal reasonably suspects that the applicant's relevant IELTS test report purports to have been, but was not, issued in respect of the applicant. It follows that the Tribunal finds that this IELTS test report is a "bogus document" within the meaning of s.97(a). The Tribunal is therefore not satisfied that there is no evidence before it that the applicant has given or caused to be given to the Minister or an officer a bogus document in relation to the application for the visa. It follows that the applicant does not meet the requirements of PIC 4020(1).

8 8 The reasoning in these two paragraphs, although expressed to be in the alternative, has much in common. Paragraph [17] rests on the MRT's own letter sent to the applicant in compliance with s 359A of the Migration Act on 17 June 2013 which raised the issues reported by Ms Wagner. Paragraph [18] rests on the MRT member's statements to the applicant at the hearing on 3 April and on the obvious circumstance that the photograph on the IELTS verification document was not that of the applicant.

9 9 The applicant was unrepresented in the proceedings before the FCC, as he was on the present application. His application to the FCC for judicial review contained one ground:

The decision made by [the] tribunal officer. They said the ILETS [sic] document which is given by me was bogus. They said am not sat on that Test. But I still claim I sat on that test. I did not did anything wrong with that document. I recived [sic] that certificate by post in same time period when I gave that test.

10 10 This did not raise a proper ground for judicial review. The question for the FCC Court was whether the decision of the MRT was affected by an error of law or a denial of procedural fairness: *Plaintiff M61/2010 v The Commonwealth* [2010] HCA 41 at [77]-[78]; (2010) 243 CLR 319 at 353-354. Instead, the ground indicated that the applicant sought a merits review of the MRT's finding that the IELTS report was a bogus document.

11 11 The FCC Judge summarised the history of the applicant's application and the MRT's findings and then concluded:

[13] This finding was open to the Tribunal to make. There was evidence there that supported such a finding. This finding is critical to the determination of the application before me.

[14] The applicant has not directed the Court to any jurisdictional error or, for that

matter, any error at all by the Tribunal.

- [15] This matter comes before me as a show cause hearing. On the basis of the view that I have formed that the applicant has not raised an arguable case, the only appropriate course for me to take is for me to make an order that the application be dismissed.

The order of the FCC Judge confirmed that the application was dismissed pursuant to r 44.12 of the FCC Rules.

- 12 12 Section 24(1A) of the *Federal Court of Australia Act 1976* (Cth) (the FCA Act) has the effect that an appeal may not be brought from an interlocutory judgment of the FCC other than with the leave of this Court. Rule 44.12(2) of the FCC Rules provides that a dismissal of proceedings under r 44.12(a) is interlocutory in nature. Some decisions of this Court indicate that r 44.12(2) governs the determination of whether a judgment is interlocutory for the purposes of s 24(1A): *SZLQZ v Minister for Immigration and Citizenship* [2008] FCA 717 at [5]-[6]; *MZZBU v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCA 840 at [25]-[26]; *SZTBO v Minister for Immigration and Border Protection* [2014] FCA 269 at [19]; *MZZPL v Minister for Immigration and Border Protection* [2014] FCA 110 at [19]-[20]. There may be a question as to whether a rule of the FCC can govern the meaning of the expression “interlocutory judgment” in s 24(1A) of the FCA Act, but that was not raised on the present application. In any event, the FCC appears to have dismissed the application before it on the ground that its jurisdiction had not been invoked. Such a decision is interlocutory in nature: *SZAJB v Minister for Immigration and Citizenship* [2008] FCAFC 75 at [23]; (2008) 168 FCR 410 at 418-9. Hence, the applicant requires leave to appeal.

- 13 13 On an application of this kind, generally the Court enquires first as to whether, in all the circumstances, the judgment of the FCC Judge is attended by sufficient doubt to warrant it being reconsidered on appeal and, secondly, whether substantial injustice will result if leave is refused, supposing the decision to be wrong: *Decor Corporation Pty Ltd v Dart Industries Inc* [1991] FCA 655; (1991) 33 FCR 397 at [398]-[399]. These tests are not to be applied inflexibly: *Samsung Electronics Co Ltd v Apple Inc* [2013] FCAFC 138 at [19]; *Alcock v Commonwealth of Australia* [2012] FCA 870 at [37]-[48].

- 14 14 The application for leave to appeal contains a single ground:

Am not agree with Court decision because am not satisfied with document which they show me my ILETS [sic] certificate was bogus.

This ground states the applicant's dissatisfaction with the decision of the FCC Judge, but does not set out a basis upon which the correctness of that decision may be doubted. Although the Court explained to the applicant the confined nature of judicial review, his oral submissions did not identify any ground for judicial review. Instead, the applicant maintained that he had himself sat the test to which the IELTS report related, that the discrepancy must be a consequence of administrative error by the Centre conducting the test, and that he should be given one further chance to demonstrate his English competence.

15 15 Despite this, I have considered whether the MRT did provide procedural fairness to the applicant and whether it complied with the statutory requirements relating to its review. Section 359A of the Migration Act obliged the MRT to inform the applicant of its concerns about the validity of the IELTS certificate and to give him an opportunity to comment on it. Section 359A provides:

- (1) Subject to subsections (2) and (3), the Tribunal must:
 - (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
 - (b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review, and the consequences of it being relied on in affirming the decision that is under review; and
 - (c) invite the applicant to comment on or respond to it.
- (2) The information and invitation must be given to the applicant:
 - (a) except where paragraph (b) applies—by one of the methods specified in section 379A; or
 - (b) if the applicant is in immigration detention—by a method prescribed for the purposes of giving documents to such a person.
- (3) The Tribunal is not obliged under this section to give particulars of information to an applicant, nor invite the applicant to comment on or respond to the information, if the Tribunal gives clear particulars of the information to the applicant, and invites the applicant to comment on or respond to the information, under section 359AA.

...

I am satisfied that the MRT complied with these requirements.

16 16 The MRT wrote to the applicant's representative on 14 March 2013 inviting the applicant to appear before it and to give evidence and present submissions. It enclosed a number of documents with that invitation, but the nature and content of those documents was not disclosed to the FCC.

17 17 The applicant and his representative attended a hearing on 3 April 2013. The MRT member explained to the applicant that the photograph on the IELTS verification

website of the person who underwent the test relied upon by the applicant was different from the photograph on the certificate which he had provided. The MRT member provided a copy of the IELTS verification website record and explained to the applicant that the discrepancy could lead it to conclude that he was not the person who had actually sat for the IELTS test. The MRT member went on to explain that this could lead to a conclusion that the submitted IELTS certificate was a bogus document and, in turn, that this could mean that he did not meet the requirements of PIC 4020(1).

18 18 The MRT invited the applicant to respond to or comment on this information and, at the same time, indicated that he could request additional time in which to do so. The applicant indicated that he wished to respond immediately. The MRT recorded the applicant's response as follows:

The applicant said that he did not know the person in the photograph from the IELTS verification website which he had been shown by the Tribunal. He confirmed that he sat the test himself and the results were sent to him by post and he then gave the results to the Department. The applicant said that he sat the test so many times and does not have records or evidence to prove that it was him, except that he went there and sat the test. He said that he went to India to see his family and sat the test on 15 January 2011. He initially got his results by internet and then received the hard copy of the results 13 days later by post. He confirmed that he still has the original of his IELTS test report, which he agreed to provide to the Tribunal within 7 days.

19 19 The MRT requested the applicant to provide the original of his IELTS test report for the purposes of possible examination by a document examiner. The applicant provided the original and it was submitted for examination by Ms Wagner. Her conclusions have been set out above.

20 20 On 17 June 2013, the MRT provided a copy of Ms Wagner's report to the applicant, via his representative. The MRT drew the applicant's attention to the examiner's conclusion, to PIC 4020(1), to the definition of "bogus document" in s 97 of the Migration Act, and to the significance which acceptance of the examiner's conclusion could have for his application for review.

21 21 The applicant's representative, a solicitor and migration agent, responded to the MRT on 10 July 2013 saying (relevantly):

My client has instructed me that he did sat (sic) for his IELTS and denies that the test report "has been fraudulently altered".

He has no capability or capacity to proof [sic] otherwise of irregularities mentioned

in MRT faxed letter dated 17 June 2013.

The correctness of the statement in the second paragraph of this letter from the applicant's representative is doubtful, at least if it be the case that the discrepancy in the two photographs was the result of a recording mistake by the Centre which had administered the IELTS test. However, there was no obligation on the MRT to advise the appellant or his representative as to the lines of inquiry which could be undertaken.

22 22 In summary, the MRT did, in accordance with s 360 of the Migration Act, invite the applicant to appear to give evidence and present arguments; it did, in accordance with s 359A give the applicant a clear indication of the information it sought which could be the reason for it affirming the decision under review; and it did, at the hearing on 3 April 2013, explain orally to the applicant and his representative the nature of its concerns and the importance of the information to its decision.

23 23 In *Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42 (which was delivered after the MRT decision in the present case), the Full Court considered some aspects of the definition in s 97 of "bogus document" and PIC 4020. Buchanan J, with whom Allsop CJ and Rangiah J agreed, held that it was not necessary for the application of PIC 4020 that an applicant be *knowingly* involved in the giving of false information, but that it was necessary that the information provided be *purposely* untrue: at [23]-[44].

24 24 The MRT did not make any express finding in this case that the submitted IELTS report was purposely untrue. However, such a finding is necessarily implicit in the MRT's acceptance of Ms Wagner's report and its conclusion that there was a reasonable suspicion, for the purposes of s 97(a), that the document had not been issued in respect of the applicant. A fraudulent alteration of the document could not occur without purposeful activity.

25 25 There was no suggestion that the MRT had not complied with its obligations with respect to the giving of reasons as contained in s 368 of the Migration Act.

26 26 In these circumstances, the Court has not discerned any denial of breach of procedural fairness or failure to comply with the requirements of the Migration Act.

27 27 Accordingly, the applicant does not establish reasonable grounds for
supposing that the FCC decision may be affected by error, and it is not necessary to consider
the second of the tests relating to the grant of leave to appeal.

28 28 The application for leave to appeal should be dismissed.

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I certify that the preceding twenty-
eight (28) numbered paragraphs are
a true copy of the Reasons for
Judgment herein of the Honourable
Justice White.

Associate:

Dated: 19 August 2014